UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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BERNARDO FLEURIMA and BIANCA ESTY,

Plaintiffs,

-against-

THE CITY OF NEW YORK,
POLICE OFFICER RYAN O'CONNOR, Shield #362,
POLICE OFFICER CHRISTOPHER MCKENNA, Shield #31940,
POLICE OFFICERS JANE/JOHN DOE(S) #s 1-10,

Defendants.

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JOINT PRETRIAL ORDER

15-CV-2616 (AMD) (LB)

JOINT PRETRIAL ORDER

Honorable Ann M. Donnelly, District Judge:

The undersigned attorneys affirm and declare that this Joint Pretrial Order is submitted in conformity with the Individual Motion Practices and Rules of United States District Judge Ann Donnelly. Having conferred among themselves pursuant to Rule 16, Fed. R. Civ. P., the parties adopt the following statements, directions and agreements as the Pretrial Order, jointly, except as otherwise noted:

i. ***Caption***

The current case caption is reflected above.

Defendants respectfully request, unilaterally, that without waiving or in any way limiting plaintiff's claims advanced against defendant City of New York based upon a respondeat superior theory of recovery, defendant City of New York be removed from the caption on any materials that will be presented to the jury during trial in order to prevent undue prejudice to defendants. See

Eliacin v. City of New York, 12-CV-4223 (BMC) (Pretrial Conference Transcript dated February 15, 2013); see also, Blake v. City of New York, 05 Cv. 6652 (BSJ), 2007 U.S. Dist. LEXIS 95913, *5-6 (S.D.N.Y. July 13, 2007) (Because the individual Officer-Defendants were acting within the scope of their employment when the events at issue took place, should they be found liable no further determination need be made by the jury to establish plaintiff's respondeat superior claim against the City and under these circumstances, referring to the City as a named defendant is unnecessary and could confuse the Jury). In addition, defendants object to the inclusion of John and Jane Doe defendants in material presented to the jury. See Jean-Laurent v. Hennessy, 840 F. Supp. 2d 529, 557 (E.D.N.Y. 2011) (quoting Rasmussen v. City of New York, 766 F. Supp. 2d 399, 412 (E.D.N.Y. 2011) ("The court agrees that removal of 'P.O. John Doe' from the caption of this case is warranted because plaintiff may not 'maintain a suit against officers on a 'John Doe' basis, or even . . . sue some by name and then assert claims against unnamed defendants, and expect to receive a verdict and judgment against the named officers based on what John Doe allegedly did.'").

ii. ***Parties and Counsel*:**

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Note: Defendants will designate co-counsel when this case proceeds to trial.

iii. ***Jurisdiction*:**

Plaintiff:

The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 in that it involves a federal question, and supplemental jurisdiction under 28 U.S.C. § 1367 for plaintiff's state law tort claims.

Defendants:

Defendants do not contest subject matter jurisdiction.

iv. ***Claims and Defenses*:**

Plaintiff's Claims

1) Plaintiffs claim false arrest pursuant to 42 US Section 1983. Plaintiff Fleurima was falsely arrested on two occasions, September 11, 2014 and November 9, 2014 by defendant O'Connor. Plaintiff Fleurima also claims defendant McKenna falsely arrested him on November 9, 2014. Plaintiff Esty claims false arrest for the November 9 incident against both defendants O'Connor and McKenna.

2) Plaintiffs claim excessive force pursuant to 42 USC Section 1983. Plaintiffs claim excessive force by defendants O'Connor and McKenna for the November 9, 2014 incident.

3) Plaintiffs Fleurima and Esty claim assault and battery as against defendants O'Connor and McKenna for the November 9, 2014 incident.

4) Plaintiffs claim defendant McKenna and/or O'Connor failed to intervene to prevent known Constitutional violations of plaintiff Fleurima's rights.

5) Plaintiff Fleurima claims defendants O'Connor and McKenna retaliated against plaintiff, under both Federal and State law, for both bringing this action and filing a complaint against defendant O'Connor for the September 11, 2014 arrest and the November 9, 2014 arrest.

6) Plaintiff Fleurima claims property damage and conversion for the November 9, 2014 arrest.

Defendants' Defenses

1.) The Second Amended Complaint fails to states a claim upon which relief can be granted.

2.) Defendants have not violated any rights, privileges, or immunities under the Constitution or laws of the United States or the State of New York or any political subdivision thereof, nor have defendants violated any Act of Congress providing for the protection of civil rights.

3.) Any injury alleged to have been sustained resulted from plaintiffs' own culpable or negligent conduct and/or the culpable or negligent conduct of others and was not the proximate result of any act of the defendants.

4.) There was probable cause for plaintiffs' respective arrests, detentions and prosecutions.

5.) Plaintiffs cannot obtain punitive damages as against the City of New York.

6.) At all times relevant to the incident, defendant City of New York and its employees and officials acted reasonably and in the proper and lawful exercise of their discretion. As such, defendant City is entitled to governmental immunity

7.) Plaintiffs provoked any incident.

8.) Any search was justified by probable cause and/or reasonable suspicion.

9.) Defendants Police Officer O'Connor and Police Officer McKenna have not violated any clearly established constitutional or statutory right of which a reasonable person would have known and, therefore, are protected by qualified immunity.

10.) At all times relevant to the acts alleged in the complaint, defendants Police Officer O'Connor and Police Officer McKenna acted reasonably in the proper and lawful exercise of their discretion.

11.) Plaintiffs cannot pursue federal failure to intervene claims against P.O. McKenna or P.O. O'Connor because they are proceeding on the theory that each defendant was a direct participant in his alleged Constitutional violations. Morgan v. County of Nassau, 720 F. Supp. 2d 229, 240 (E.D.N.Y. 2010) (both claims, based on the same conduct, cannot be viable against an individual defendant).

12.) Plaintiff Fleurima's false arrest and retaliation claims against P.O. McKenna and P.O. O'Connor related to November 9, 2014 arrest are barred by his subsequent criminal conviction. Heck v. Humphrey, 512 U.S. 477 (1994).

13.) Plaintiffs have failed to mitigate their alleged damages.

14.) Plaintiffs cannot establish P.O. McKenna and P.O. O'Connor's personal involvement in each of their alleged constitutional violations sufficient to establish liability pursuant to 42 U.S.C. § 1983.

15.) Plaintiffs may have failed to fully comply with the provisions of New York General Municipal Law §§ 50(e)(h) and (i).

16.) Plaintiff Fleurima has failed to avail himself of New York State law remedies for redressing alleged deprivations of property. See Jones v. Holmes, No. 11-CV-5490 (ARR)(JMA), 2013 U.S. Dist. LEXIS 6614, at *8 (E.D.N.Y. Jan. 15, 2013).

v. *Damages*:

Plaintiff claims damages for loss of liberty/detention, psychological and emotional suffering, economic injuries, property damage, damage to reputation, stress, hospitalization and medical treatment and injury, and infringement of constitutional rights. Plaintiff was damaged in an amount to be determined by a jury.

vi. *Jury or Bench Trial*:

This case is to be tried to a jury. The parties estimate that the trial will require 3 to 5 days.

vii. *Consent to Trial by Magistrate Judge*:

The parties have not consented to trial of the case by a Magistrate Judge.

viii. *Stipulations*:

None.

ix. ***Witnesses*:**

Plaintiff's Witnesses:

A. Plaintiff Bernando Fleurima

Mr Fleurima is expected to testify as to his experience, detention, prosecution and injuries sustained as a result of the complained of incidents and their aftermath.

B. Plaintiff Bianca Esty

Ms. Esty is expected to testify as to his experience, detention, prosecution and injuries sustained as a result of the complained of incidents and their aftermath.

C. Corven Desir. 100 East 21st Street, # 407, Brooklyn, NY.

Mr. Desir is expected to testify as to his observations of the November 9, 2014 incident. In the event Mr. Desir is not available at the time of trial, plaintiff intends to utilize his prior sworn testimony in this matter.[1]

Plaintiff reserves the right to call any and all of the defendants' witnesses on plaintiff's case in chief.

Defendants' Witnesses:

A. **Police Officer Christopher McKenna -** Defendant Police Officer McKenna will testify about his interaction with plaintiffs on November 9, 2014.

B. **Police Officer Ryan O'Connor** - Defendant Police Officer O'Connor will testify about his interaction with plaintiffs on November 9, 2014, and his interaction with plaintiff Fleurima on September 11, 2014.

C. **Detective William Simon -** Detective Simon will discuss the investigation of plaintiff Fleurima and the provenance of documents memorializing the investigation.

x. ***Deposition Testimony:***

[1] Defendants object to this witness. Defendants served Mr. Desir with a subpoena to appear for a deposition, and confirmed his attendance in advance by telephone, on three separate occasions. Nevertheless, he repeatedly willfully failed to appear. Defendants are moving *in limine* to preclude this witness from testifying.

The parties have not designated any deposition testimony to be offered at trial in lieu of live testimony. The parties reserve the right to use a deposition of a testifying witness for substantive or impeachment purposes, as authorized by Rule 32 of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

xi. *Exhibits*:[2]

Plaintiffs' Proposed Trial Exhibits

Desig.	Description of Exhibit	Basis for Objection
1	Methodist Hospital Records for Plaintiff Fleurima	FRE 402, 403, 802. To the extent the offered records are not certified copies, defendants also object pursuant to FRE 901[3]
2	Photos/Portion of video of car damage	FRE 402, 403, 802, 901
3	Portions of Plaintiff Fleurima's Internal Affairs Complaint of the September 2014 arrest	FRE 402, 403, 802. Defendants also object on the grounds that this proposed exhibit is ambiguous, as it is unclear to defendants which documents plaintiffs seek to introduce.
4	No. 212-95 USE OF PEPPER SPRAY DEVICES	FRE 402, 403, 802
5	Methodist Hospital Bill	FRE 402, 403, 802, 901
6	Criminal Trial Testimony of Corven Desir in the event he is unavailable at time of trial	FRE 402, 403, 802, 804
7	Certificate of Disposition relating to 9.11.14 ticket	FRE 402, 403, 802
8	Declined Prosecution, Bates 596	FRE 402, 403, 802
9	Investigation of Missing Property: Bates 323	FRE 402, 403, 802
10	Depositions of all those deposed in this matter for impeachment	
11	Criminal Trial Transcript for impeachment	
12	DD5's and Bates Stamped Discovery for Impeachment	Defendants object to the ambiguity of Bates Stamped Discovery
13	DA's office documentation for	

[2] Pursuant to Provision 5(A)xii of the Court's Individual Practices and Rules, all exhibits will be pre-marked for trial and exchanged at least ten days prior to trial.

[3] The parties have exchanged certified copies of these medical records. In accordance with Your Honor's Individual Rules, the parties will resolve objections to authenticity prior to trial.

	impeachment	
14	CCRB materials for impeachment	
15	Defendants Answer and Responses to Interrogatories for impeachment	

* Plaintiffs reserve the right to use any of defendants' exhibits.

Defendants' Proposed Trial Exhibits

Desig.	Description of Exhibit	Basis for Objection
A	Plaintiff Fleurima's Certified Medical Records from Methodist Hospital, bearing Bates Stamp Nos. 256 - 277	None
B	Certificate of Disposition, Docket No. 2015KN062045	Never Exchanged. FRE 402, 403, 802 bolstering, hearsay
C	Property Clerk Invoice No. 3000424723	FRE 402, 403, 802 bolstering
D	Fleurima Arrest Report for 9/11/14, bearing Bates Stamp Nos. 1 - 3	FRE 402, 403, 802 bolstering, hearsay
E	Fleurima Complaint Report for 9/11/14, bearing Bates Stamp Nos. 4 - 5	FRE 402, 403, 802 bolstering, hearsay
F	Desk Appearance Ticket for Fleurima 9/11/14 Arrest, bearing Bates Stamp No. 6	FRE 402, 403, 802 bolstering, hearsay
G	70th Precinct Detective Files regarding the investigation of Plaintiff Fleurima, bearing Bates Stamp Nos. 307 - 319	FRE 402, 403, 802, bolstering, hearsay
H	Fleurima Arrest Report for 9/21/15 (for 11/9/14 underlying incident), bearing Bates Stamp Nos. NYC 278 - 280	FRE 402, 403, 802, bolstering, hearsay
I	Fleurima Complaint Report for 11/9/14, bearing Bates Stamp Nos. NYC 281-284	FRE 402, 403, 802, bolstering, hearsay
J	Plaintiffs' Complaint, filed May 7, 2015 - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
K	Plaintiffs' Amended Complaint, filed September 3, 2015 - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
L	Plaintiffs' Second Amended Complaint, filed October 21, 2015 - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
M	Plaintiffs' Response and Objections to Defendants' Discovery Demands, Dated July 1, 2016 - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
N	Plaintiff Esty's Notice of Claim -	As per discussion with counsel, since defendants do

	for impeachment purposes	not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
O	Plaintiff Fleurima's Notice of Claim - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
P	Plaintiff Esty's Deposition Transcript - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
Q	Plaintiff Fleurima's 50-h Transcript - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
R	Plaintiff Fleurima's Deposition Transcript - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
S	Plaintiff Esty's prior statements to CCRB - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
T	Plaintiff Fleurima's prior statements to CCRB - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
U	Plaintiff Fleurima's prior statements to IAB - for impeachment purposes	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
V	Plaintiff Esty's criminal trial testimony - for impeachment	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.
W	Plaintiff Fleurima's criminal trial testimony - for impeachment	As per discussion with counsel, since defendants do not intend to publish to jury exhibit s J - W, plaintiff will reserve right to object at time of trial.

* Defendants reserve the right to use any of plaintiffs' exhibits.

Dated: Brooklyn, New York
March 19, 2017

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By: __________/S_____________________

MELANIE SPEIGHT

SO ORDERED:

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HONORABLE ANN DONNELLY
UNITED STATES DISTRICT JUDGE